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Supreme Court of the United States

OCTOBER TERM, 1946.

No. 625.

PETER CALDAROLA, (Plaintiff-Appellant in the Court below),

Petitioner,

against

MOORE-McCORMACK LINES, INC.,

Defendant,

and

GERDA ECKERT and THOR ECKERT, JR., partners doing business under the firm name of THOR ECKERT & CO., (Defendants-Respondents in the Court below),

Respondents.

REPLY BRIEF FOR RESPONDENTS, THOR ECKERT & COMPANY.

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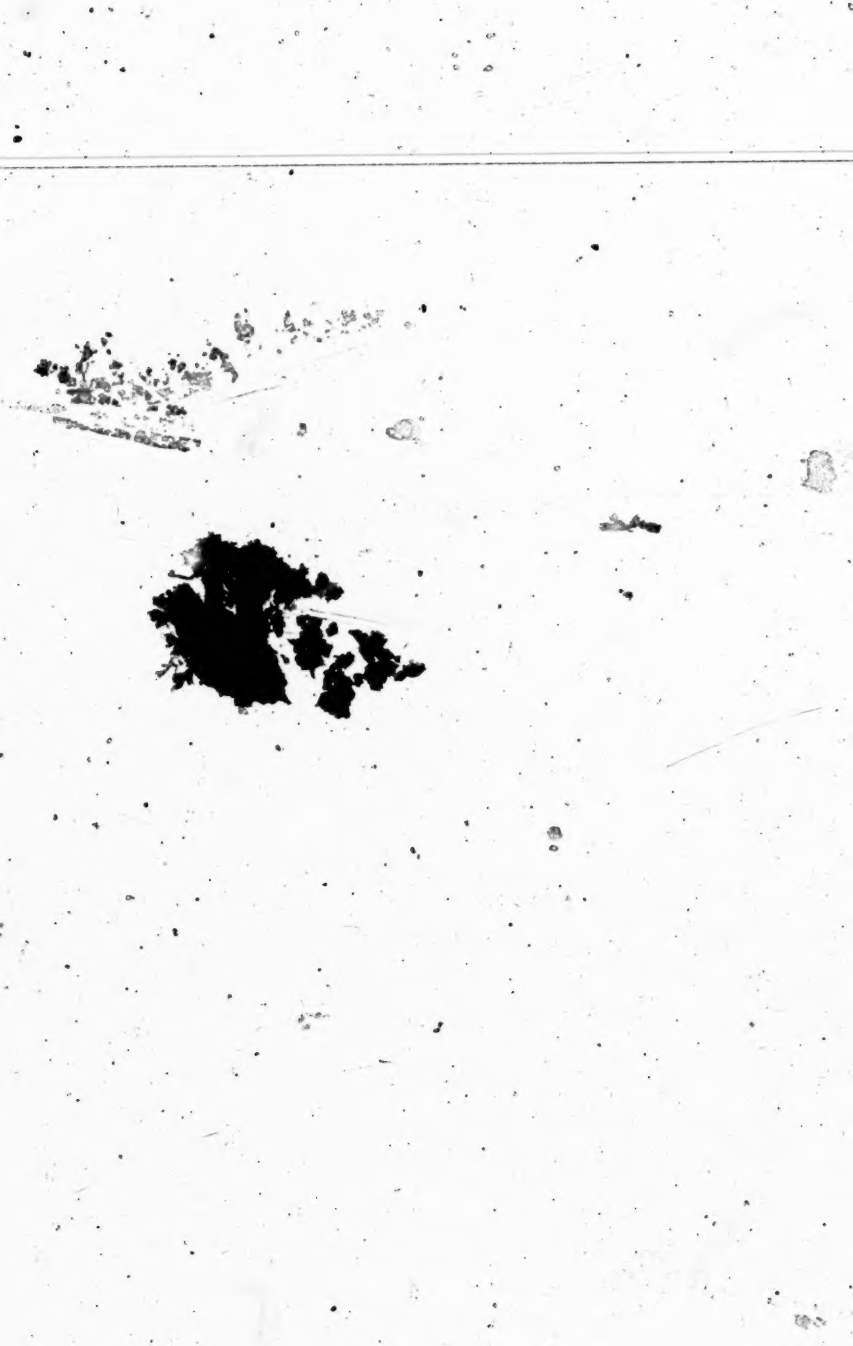

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Respondents.

REPLY BRIEF FOR RESPONDENTS, THOR ECKERT & COMPANY.

POINT I.

IN REPLY TO THE SECOND POINT OF THE BRIEF OF THE UNITED STATES.

The United States supports respondent's position that it was not in physical control of the *SS Everagra.* It goes on, however, to contend that, nevertheless, respondents may be held liable to the petitioner because of an alleged failure to perform a supposed contractual obligation in

respect of keeping the boom in sound condition. It is contended that the contractual obligation was owed, not only to the United States, but to the peititoner.

The United States is mistaken.

A. *The mistake with respect to whom the duty, if any, was owed.*

The contractual duties which the respondents owed to the United States were not owed to the petitioner. The cases and other authorities cited by the United States do not support the thesis that they were.

On the contrary, the authorities cited by the United States actually support respondent's thesis—*i. e.*, that, in the absence of a legally significant relationship (status), such as employer-employee, etc., duties for the non-performance of which there may be liability in tort depend on control. The point which the United States has missed is that such control may be of two kinds. On the one hand, there is control of premises and, on the other, control of acts or activities. An agent may be in control of premises for his master. He may also be in control of acts and activities for his master. Whereas his control of premises for his master does not make him an occupier of premises, since he is acting in a representative capacity, nevertheless, his control, under such circumstances, may be regarded as an act to the same extent as his control of other acts and activities. Failure to act properly when one is in control, whether it be of activities or premises, and irrespective of whether one is an agent or not, is a tortious *act*.

The cases relied upon by the United States at page 22 of its brief are all cases where liability was founded on such negligent *acts*. They involved persons who were in control of premises or in control of activities.

At the same time, the authorities cited by the United States recognize that there is nothing tortious in the mere failure of an agent, or anyone else, to keep a promise, whether it be a promise to repair or a promise to do anything else.

Thus, *Mechem*, cited by the United States, at page 22 of its brief, puts the matter succinctly, as follows:

> "For similar reasons, the agent should be held responsible for injuries caused by his neglect to keep in repair premises *under his control* where he is charged by his principal with the duty to repair and has the necessary means, in any case in which he would be liable for the same injury *if he were controlling the premises on his own account.* In these cases in which the agent has both the duty (to his principal) and the power to repair, and fails to do so, the injury can fairly be regarded as the consequence *of his own act.* If an agent would be responsible for negligently driving his principal's team against a third person, as he would undoubtedly be, is he any the less responsible because he negligently fails to guide the team or negligently permits it to go unguided or negligently leaves it unattended and injury thereby results? *If the agent is not in control* or has neither the duty nor the power to repair, *the failure to repair cannot be regarded as his act.* But where these conditions are present it is difficult to see why it is not properly to be regarded as his *act.* It is, of course, in one sense a not-doing, a nonfeasance; but *his act of control is a doing,* a feasance, and his failure to properly control is a misfeasance, if any importance is to be attached to these terms."
>
> 1 *Mechem on Agency,* Second Edition, 1914, p. 1093. (Italics supplied.)

Thus, in *Hudson* v. *Moonier*, 102 F. (2) 96, cited by the United States at p. 22 of its brief, the court said at page 98:

"Under Missouri law a third party has no right to maintain an action for injuries resulting from a breach of contract between two contracting parties. (citing cases)

"In the last cited case it is said: 'The violation of a contract will not, as such, furnish a basis for liability in tort, but the act which violates the contract may be a negligent one which creates such liability.' "

In all of the cases cited by the United States at page 22 of its brief, it was not the contractual obligation on which the tort liability was founded. The principle involved is illustrated clearly by *Van Winkle* v. *American Steel Boiler Insurance Company*, 52 N. J. L. 240, cited by the United States at p. 22 of its brief, wherein the court held that the defendant did not have any obligation at all to inspect a steam boiler and discover its defects. Nevertheless, the defendant was held liable because it had actually inspected the steam boiler on many occasions, and had approved it as being free from defect. Here, again, it was negligent action with respect to an activity within the control of the defendant which was the basis of liability.

Section 387 of the Restatement, quoted on page 21 of the United States' brief, makes the agent's "entire charge" of the premises—*i.e.*, control—the basis of the agent's liability.

Control is one of the fundamentals of tort law. If there be no relationship or status to which the law affixes duties, and there is no control, there can be no liability for failure to act, whether the defendant be an agent or not.

The only significance which an agent's contract—*i.e.*, promise—can have is that, in a case where the agent is in control, it may determine the extent to which the agent should go in exercising such control carefully. In other

words, an agent in control, who has agreed with his principal to perform certain acts, must, in the exercise of reasonable care, achieve the standard achieved by agents similarly situated—*i.e.*, those who have made similar commitments. Thus, even though the agent be in control of his master's premises, if the agent has neither the power nor duty to make repairs, he is not liable if injury is caused to someone because the repairs are not made. 1 *Mechem on Agency*, Second Edition, 1914, p. 1095. Similarly, if the agent is in control, but performs all the duties which the principal requires of him, he is not liable. See *Bailey* v. *Zlotnick*, 133 F. (2) 35, a decision by Mr. Justice Rutledge.

The rule that, in the absence of a legally significant relationship (status), liability for negligence is founded on control, is not a "local rule in New York", as the United States indicates at page 20 of its brief. It is the equivalent of the distinction between a contract and a tort. If the rule were to be abandoned, the distinction between a contract and a tort would have to be abandoned.

There is a basic reason why a failure to perform a contractual duty cannot be a ground for tort liability. A contractual duty is as variable as the intentions of the parties to the contract, not only as they may be expressed at the time of first contracting, but also, as subsequently modified. By reason of this variability, a contractual undertaking is not a satisfactory standard for regulating conduct. Thus, it is comparatively easy to grasp the meaning of the phrase "reasonable diligence" when used as a part of the definition of those duties for the non-performance of which there is tort liability. On the other hand, it is impossible to know what two contracting parties may have meant by using the same phrase.

New York law is in entire accord with the cases cited by the United States at page 22 of its brief. See

Mollino v. *Ogden*, 243 N. Y. 450, where an agent in charge of the management of a building was held liable for failure to perform a duty of repair which he had contracted to perform. But, there, as in all such cases, wherever they may be decided, the agent was in control although in a representative capacity, and, being in control, he was liable for his acts.

See also *Oliver* v. *Bereano*, 267 A. D. 747, aff'd. 292 N. Y. 93, where the defendant which contracted to repair an automobile was held liable to a person injured because the repairing was performed negligently.

Care should be taken to distinguish cases such as *Appel* v. *Muller*, 262 N. Y. 278, wherein was involved the historic liability of owners of property to persons on the highway caused by the condition of the premises. Such liability continues even though the owner is out of possession provided he retains a right of entry for the purpose of repair.

Thus, the New York courts correctly stated in the case at bar not only the New York law, but also the general law throughout the United States. This case, in principle, is just like that of *Cullings* v. *Goetz*, 256 N. Y. 287, which holds that neither an agent nor anyone else is liable for failure to make repairs to premises which he does not control.

At all events, if there is any difference between New York law and the maritime law, it is the former which must prevail, because the accident happened in the State of New York in navigable waters, and because a statute requires it. See 16 U. S. C. 457, as construed in the case of *Puleo, Adm'x* v. *H. E. Moss & Company and Todd Shipyard Corporation* ..... F. (2d) ..... decided by the Circuit Court of Appeals for the Second Circuit on February 20, 1947.

The United States cannot, in logic, maintain that the General Agent was not in control of the vessel, and, yet, was liable for negligently exercising control of the vessel. The two are mutually exclusive.

The General Agent either was in control, or he was not in control of the vessel. If he was not in control, as the United States rightly maintains in the first point of its brief, then, there can be no liability in tort for the mere failure to perform a contractual obligation to the United States.

It is significant that the petitioner does not assert in his brief that the respondents are liable for the mere failure to perform a supposed contractual obligation to the United States. Petitioner rests his claim on an assertion that the respondents had control. Petitioner's Brief, p. 23. Petitioner refers to this control as a limited control or a "measure of control". Petitioner's Reply Brief, p. 4. In adopting this phraseology of uncertain meaning, petitioner is really claiming, as indicated at the time of the argument, that respondents had "just enough" control to warrant the reversal of the judgment.

However, if the United States had control, as the evidence in the case shows,* and the master exercised that control on behalf of the United States, and all that the General Agent had was an implied right to go on board the vessel in order to perform his duties when, as, and if permitted by the master to do so, the agent did not have any control

* Again we challenge the statement made by the petitioner in the first paragraph of page 20 of his brief, wherein he says that "not a single order, direction, or request was ever made by the United States Government or the War Shipping Administration directly to any officer or member of the crew of any vessel operated under the General Agency Agreement." We refer to Directive No. 2, entitled "To the Masters and Officers of All Vessels of the United States Merchant Marine", which appears at page 29 of the *Compilation of Orders, Rules and Regulations of the War Shipping Administration.*

at all. Instead, he had only what the Appellate Division and the Court of Appeals held that he had—a right of access to the ship. *Additional Papers to the Court of Appeals, p. 10.* This is not control.

The General Agent had no more control than a local plumber would have who might make a contract with a householder to inspect and keep in repair the plumbing of a house. Actually, the General Agent did not have as much, for, as we shall show, the General Agent's contract was not "to inspect and repair", but, essentially, to cooperate with certain servants of the United States in inspection and to report to other servants of the United States as to what the inspection disclosed. However, if the plumber should never visit the house at all, it could not be said that he controlled even the activity of inspection and repair. Even though he should visit the house on occasion, and then engage in the activities of inspection and repair, he could be said to be in control of only those things which he did, or failed to do, on such visits.

Petitioner's case rests solely on the naked claim that the respondents had a duty and authority to visit the ship for the purpose of making inspections and repairs; that this duty and authority, whether exercised or not, was the equivalent of giving some control of the vessel to the General Agent; that, since the Agent had such control, the duty of inspection and repair was owed to third persons; and that the mere happening of the accident shows that the duty was not performed.

It is this misconstruction of the meaning of control which is at the bottom of petitioner's argument. The Appellate Division and the Court of Appeals pointed it out. To be sure, it is not the only error affecting petitioner's claim. However, it is fundamental and sufficient to justify the dismissal.

There is one further ground of liability on which the petitioner relied in the Appellate Division, but which, apparently, he has now abandoned, since he has not mentioned it in his brief in this court. However, the United States has resurrected it. We refer to Restatement, Agency, Section 354, cited at page 22 of United States' brief.

Therein, it is said that if an agent undertakes to perform an obligation which his principal owes to a third party to provide the latter with protection, the agent may be held liable if the third party is injured because of a failure to provide protection.

The liability referred to herein does not seem to be supported by the decided cases. It seems to be the creation of the drafters of the Restatement, who have frankly admitted, in this instance, that they were not re-stating the law as it was, but as they wished it were. See Tentative Draft No. 6, pp. 209, 210. Furthermore, the Restatement makes it clear that the liability in question does not result from an agent's contract with his principal. Restatement, Agency, Section 354, Comment d. Although the factual situation is one which is reminiscent of *Laurence* v. *Fox*, actually, the legal principles are not related at all to that case. Instead, the supposed duty results from the undertaking of one person to substitute for another. The supposed tort lies not in failing to give the agreed protection, but in depriving the injured person of the protection which he would have had from the person who was obligated to give it. The rationale is either that of tortious interference with an existing relationship or the establishment of a new one to which the law attaches duties.

It has no application in this case. The respondents did not undertake to perform the obligations of the United States. They undertook merely to inspect and report so

that the United States could satisfy itself as to the condition of its ships. R. 349. They did not undertake to inspect and report so that they might be made safe for anyone. The trial court so charged. R. 307. There is nothing in the entire record to show that the United States relied on its General Agents to prevent injuries, either to members of the crew or to others. The uncontradicted evidence is that the vessel's crew was charged by the United States with the duty of seeing that the boom was kept in a proper condition and of discovering its defects, if any. R. 156, 157, 147.

B. *The mistake with respect to the nature of the duty owed by the General Agent.*

The United States is also mistaken in its contention that the respondent was in exclusive charge of maintaining and repairing the Steamship *Everagra,* and had a corresponding duty to make regular inspections to ascertain and discover defects and to have them promptly and properly repaired. See pages 18 and 19 of United States' brief.

In support of its contention, the United States offers a letter written by the General Counsel of the Maritime Commission which, it says, "authoritatively" analyzes the duties of a General Agent with respect to inspection and repairs. See page 19 and Appendix of United States' brief.

The so-called analysis is not evidence of administrative practice of which this court may take judicial notice. It is no more authoritative than the analysis of any lawyer who pleads the cause of his client. As to motivation, see page 25 of United States' brief. In this instance, it so happens that this statement of the "official" position is not in accord with the actual practice followed by the local representatives of the War Shipping Administration in this case.

In this point we shall demonstrate wherein the United States has been misinformed.

All of the obligations of the General Agent, as set forth in the General Agency agreement, depend upon the *orders* of the United States. This does not mean written orders. It means oral orders, as well. R. 337, R. 351, 352. The General Agency contract provides as follows at R. 351:

> "Article 17. • • • In performing its services hereunder, the General Agent may rely upon the instructions and directions of the Administrator, his officers and responsible employees, or upon the instructions and directions of any person or agency authorized by the Administrator. Wherever practicable, the General Agent shall request written confirmation of any oral instructions or directions so given."

Thus, the General Agent's undertaking to "maintain" the vessel (R. 338); "to arrange for the repair of the vessel" (R. 349); and to "exercise reasonable diligence in making inspections and obtaining information with respect to the state of repair and condition of the vessels, and so advise the United States from time to time, in order that the United States may satisfy itself that the vessels are being properly maintained" (R. 349) required the General Agent to do these things as ordered by the United States. See also the testimony of the witness, Rough, at R. 225, 226.

It was important, therefore, in the trial of this case, to know what orders had been given by the United States in this respect, and respondents proved these orders. The proof was from the mouth of the Assistant General Manager of the War Shipping Administration's Maintenance and Repair Division in New York. This was the head office of the Maintenance and Repair Division. See Administrative Order No. 50, at page 2 of Compilation of Orders and Regulations. This person testified, pursuant to arrangement made with his superiors in Washington, that

the primary duty of making inspections in order to discover defects was that of the master and crew of the vessel, and that the General Agent's duties began with an examination of the requisitions prepared by the crew, *i.e.*, the heads of the departments of the ship, such as the chief officer, chief engineer, and chief steward. R. 147, 148, 156. The inspection which the War Shipping Administration required of the General Agent was that it should examine the ship in the light of these requisitions, and determine which items of the requisitions were necessary. R. 147. For this purpose, it was customary for the General Agent's representative to go on board the ship in company with the War Shipping Administration's representative, and to make that determination. R. 147.

Furthermore, Maintenance and Repair Regulation No. 1 (R. 358), makes all of the duties of the General Agent with respect to inspection and repair relate to repairs which are "required" by a ship. The respondents contended below, and they contend here, that the word "require" as so used, means *requisition*. That is the primary meaning of the word, and the testimony of the Assistant General manager of the War Shipping Administration bears out the contention.

There is no doubt that under the General Agency contract the War Shipping Administration could have ordered the General Agent to make further inspections of its ships. The General Agent had agreed to make such inspections as it was *ordered* to do. There is no proof in this record that the United States ever gave any orders to the General Agent to make any inspections other than those referred to by its Assistant General Manager.

The United States now seeks to repudiate the testimony of this representative of the War Shipping Administration

given during the trial of this action. United States' brief p. 25. It is said that his testimony "does not correctly reflect the official position of this agency". It is submitted, that the "official position" of the Maritime Commission is irrelevant. The question is what "orders" the War Shipping Administration's local representatives actually gave its General agents.

As evidence that the testimony of its representative on the trial was the truth, we refer to the Maintenance and Repair Regulations as revised on December 15, 1944, and made effective as of January 15, 1945. These were marked in evidence on the trial as defendant's Exhibit M. R. 447. They were later withdrawn from evidence because it was thought that, since they had not been issued as of the time when the accident happened, they might mar the record if permitted to remain. R. 244. However, when, as now, an issue is raised by the United States as to what orders it gave, and the United States displays a willingness to go outside the record, Exhibit M has an undoubted relevance, and this court may take judicial notice of it.

These Maintenance and Repair Regulations, although issued after the accident, constituted a codification of the Maintenance and Repair Regulations which had been issued up to the time of their issue. R. 444.

In Part 3, among the formal requirements, the following appears:

> "3.1 . *Specifications for repairs.* General Agents shall obtain the vessel's requisitions for repairs from the deck, engine and steward's departments, and in order to prevent delay shall when conditions warrant use these requisitions as preliminary specifications. When the anticipated expenditure is not in excess of $10,000.00, representatives of the agents shall without reference to the Division of Mainte-

nance and Repair prepare the specifications for work in accordance with the job order classifications outlined in Sec. 3.2. A representative of the Division of Maintenance and Repair shall attend when repairs exceed $10,000.00 and when preparing defense or damage specifications. Whenever the estimated cost of work exceeds the agent's prescribed limitation, the agent shall notify the Local Manager of the Division of Maintenance and Repair. The contract shall then be awarded in accordance with Sec. 2.2."

In Part 10, with respect to foreign repairs and salvage operations, the following appears:

"10.11 *List of required repairs.* The masters and chief engineers will have prepared prior to the arrival of their vessels at the Canal a detailed list of the repair items that will be required, segregated by classification number in accordance with S. 3.2. An original and five copies shall be prepared.

"10.12 *Clearance of items for repair* (a) Subsequent to the arrival of the vessels at the Panama Canal, the repairs lists will be discussed and screened, item for item, jointly by the vessels' General Agents or subagents, masters and chief engineers and War Shipping Administration representative. A Classification Society representative should be present in the event seaworthiness or classification is involved."

"10.13. *Arrangements for repairs.* (a) The final Approved Repair List, signed by the Master, Chief Engineer and War Shipping Administration representative, shall be turned over to the vessels' agents or subagents, who shall make all of the necessary arrangements with the Panama Canal authorities for the actual undertaking or the work and its completion. It shall be the direct responsibility of the Masters or Chief Engineers to oversee and supervise to a satisfactory completion all work performed on

the vessels. The Approved Repair Lists shall become permanent records of the repair histories of the vessels, the originals and copies of which are to be handled as hereinafter prescribed. The agents or subagents, together with the Masters and Chief Engineers, shall be given unlimited cooperation by the War Shipping Administration representative in their endeavors to expedite the satisfactory initiation and completion of the necessary repairs."

The so-called "official position" of the Maritime Commission is not in accord with the facts. The facts are that the War Shipping Administration relied primarily upon the heads of the departments of its ships for inspection and discovery, and directed the General Agent to confine himself to a determination of whether the requisitions of the crew were proper or not.

The testimony of the assistant general manager of the Maintenance and Repair Division given on the trial was fully in accord with the facts and the administrative practice as shown by the regulations. It should not be disregarded at this late date because of statements as to administrative practice made in an appendix attached to a brief of the United States filed as *amicus curiae* in the Supreme Court.

C. *The mistake as to the alleged default by the General Agent.*

So far as the evidence shows, there was no default by the General Agent with respect to any of the duties which it owed the United States. Article 14 of the General Agency contract provided, in substance, that the General Agent should inspect and report. R. 349. There is no evidence that it did not. For all that appears, the General Agent may have inspected and reported to the United States that

the boom was defective and the United States decided not to do anything about it. It would not be the first time that this occurred.

As proof, we submit copies of correspondence passing between War Shipping Administration and United States Lines Company, a General Agent, with respect to the Steamship *Exterminator*. These consist of a letter written on August 19, 1943, by W. N. Westerlund, Assistant Deputy Administrator for Ship Operations to Mr. R. T. Lemon, Director Maintenance and Repair Division, 39 Broadway, New York, which we have marked Exhibit A, and a letter, dated August 23, 1943, written by G. A. Dundon, Manager Charterers and Agents Division to United States Lines Company in New York, which we have marked Exhibit B. These and other documents will be submitted in a booklet which will accompany this brief. As these letters show, the War Shipping Administration was fully informed that the Steamship *Exterminator* was badly in need of repairs. For good and sufficient reason, it decided not to make them, but to lay the vessel up in the James River. But, first, the vessel had to proceed from New York to the James River, and solely by reason of the determination of the War Shipping Administration, she sailed from New York in an unrepaired condition.

It so happened that a seaman was injured by reason of this state of unrepair.

Both the petitioner and the United States have mistakenly assumed that proof that the boom was defective was the equivalent of proof that the General Agent was negligent in its duties. When control of inspection and repair is vested exclusively in one person, it is, of course, a permissible inference that such a defect is the result of such person's negligence. But such an inference has no founda-

tion whatever when one person has a duty to inspect and report, and another person has the function of determining whether repairs shall be made or not. In such a case, one cannot tell whether the default lies in a failure to inspect or in a failure to take adequate steps after the function of inspection had been fully performed. This is, essentially, the situation in the case at bar, because there is no evidence with respect to the General Agent's alleged negligence, except that he had a duty to cooperate with other servants of the United States and that an accident happened because *some one* did not do his duty.

POINT II.

FURTHER ANSWERING THE QUESTIONS OF MR. JUSTICE BLACK.

I.

Mr. Justice Black asked on the argument whether the General Agency Contract's provision for compensation to the General Agent was dependent on the amount of the cargo which the ship carried.

Our answer follows:

It was not. Article 5 of the General Agency Contract. (R. 342) provides as follows:

> "ARTICLE 5. At least once a month the United States shall pay to the General Agent as full compensation for the General Agent's services hereunder, such fair and reasonable amount as the Administrator, War Shipping Administration, shall from time to time determine: Provided, That with respect to vessels allocated before February 25, 1942, compensation shall not be less than the amount of earnings which the General Agent would have been permitted to earn under any applicable previously

existing bareboat charters, preference agreements, commitments, rules or regulations of the United States Maritime Commission until the earliest termination date permissible thereunder as of March 22, 1942."

The proviso contained in the above article has no application to this case because the *SS. Everagra* was not allocated until March 27, 1943. R. 355. Therefore, the compensation of the General Agent in this case was entirely within the discretion of the War Shipping Administration.

II.

Mr. Justice Black asked whether those who drew up the General Agency Contract intended to "defeat" a plaintiff's right to a jury trial—*i.e.*, to eliminate as a possible defendant the General Agent against whom a jury trial might otherwise have been had, and, thus, leave available for suit only the United States which was suable only in Admiralty. Our answer follows:

Undoubtedly, this was their intention as respects those cases in which it was asserted that the General Agent was liable merely because, as alleged, he operated the vessel. They intended Government operation and this was a necessary consequence of Government operation. Therefore, they intended it in some cases.

But, they did not intend it as respects cases in which it was asserted that the General Agent was liable because of some negligent act committed by him in his capacity as a non operating agent of the United States. Although Government operation was intended, it was also contemplated that the Agent would be liable for his negligent acts and suable for them, either in admiralty or at common law, at the election of the injured party. Cf. *Hust* v. *Moore-McCormack Lines, Inc.*, 328 U. S. 707, at 748.

Thus, it was intended that an injured party should have a jury trial in some cases, but not in others.

Essentially, the question asks whether the parties intended the necessary consequences of their acts. Of course they did. The answer follows as night follows day.

If they had intended to preserve a right to sue the General Agent as an operator, they could not have intended Government operation, for the two could not co-exist. If they did not intend to preserve a right to sue the General Agent as an operator, they must have intended Government operation, because that was the only way in which they could effectuate their intention.

Therefore, the premise that they intended that the General Agent should not be suable as an operator requires the conclusion that they intended Government operation.

The suggestion that they intended private operation, but constructed a false front of Government operation for the purpose of saving the private person from a jury trial is without support either in the evidence or in common sense. What possible interest could such chicanery serve? If the elimination of a jury trial was a desideratum, it was easily attainable. All that was necessary was to have actual government operation. Why bother with private operation at all if, in order to attain the elimination of a jury trial, such hocus pocus would be required?

We assume that a personal injury litigant's right to trial by jury is a resultant of the kind of operation involved, and that, in this case, it depends solely on what the United States and the General Agent actually intended and did. If private operation is involved, the plaintiff has a right to a jury trial against a private party and no one can defeat it. If Government operation is involved, he does not have that right, and no one can give it to him.

Correspondingly, we assume that a determination as to the kind of operation involved does not depend on the desire of the personal injury litigant for a jury trial, nor on the desire to satisfy it.

Mr. Justice Black's questions respecting jury trials also embraced the motives of the parties—i.e., whether, in providing for government operation, they were motivated by a desire to eliminate the General Agent as a possible defendant in a jury trial. As to this, our answer is as follows:

The representatives of the United States may have been so motivated. Counsel is not qualified to speak authoritatively as to the motives of the United States in choosing Government operation rather than private operation.

The private interests were not so motivated. It should be obvious that they could not have had such a motive. The private interests were motivated by the desire of avoiding *all suits* against themselves as operators, whether they involved jury trials or not. If they were not going to run the show, they did not want the burdens which go with running it. On the other hand, if they were suable as operators, there was no way in which they, being private parties, could prevent being sued in any forum chosen by the plaintiff.

Mr. Justice Black also inquired as to whether the *sole* motive of the United States in choosing Government operation was to eliminate the agent of the United States as a possible defendant in a jury trial. At the time of the argument counsel could not answer this, but now, after inquiry, is in a position to do so. The answer follows:

It was not the sole motive. The motives of the United States were, primarily, the result of the war in which it was then engaged, and in which the vessels were an im-

portant factor. Direct Government operation was more advantageous to this end than indirect private operation. Direct Government operation preserved the immunity of the vessels in foreign countries. It also relieved them of the burden of regulation and taxation by local governments. It achieved speed, secrecy and efficient operation. It enabled the United States to directly control fueling, supplying, repairing, and similar services. It enabled the United States to directly control the routing, navigation, and physical management of the vessels. It carried out the mandate of the President, who had ordered the War Shipping Administration "to control the operation * * * and use of all ocean vessels".

This is fully set forth in a letter written by the General Counsel of the Maritime Commission to the Assistant Attorney General and dated April 28, 1947, which has been printed as an appendix to this brief. Appendix *infra* pp. 42-66, 47.

Most important of all, as respects the matters with which we are concerned herein, it appears that the United States believed "that crews would have greater sense of responsibility and would be more likely to refrain from strikes and other work stoppages if they were employees of the United States" appendix, p. 51. Not only did the Unions give a nostrike pledge, which they would have been reluctant to give to private operators, but they kept their pledge and there were no strikes in the American Merchant Marine during the war.

A similar Government policy with respect to coal miners was involved in the recent case of *United States* v. *United Mine Workers*, decided March 6, 1947.

The foregoing objectives motivated the United States in choosing Government operation rather than private

operation. In view of this, it would seem that the motive of eliminating jury trials, if it existed at all, was comparatively insignificant in producing the result.

Thus, the court may dismiss from further consideration the suggestion that the United States arranged with private interests for the private operation of its wartime fleet, and engaged in a conspiracy with its agents to hide the facts behind a false front of Government operation. There was true Government operation with all the consequences that such operation entailed.

III.

Mr. Justice Black asked also whether there are any differences of a substantial nature between the General Agency contract and previous contracts between the United States and its agents.

Our answer follows:

There is such a difference, and it is in respect of a matter to which Mr. Justice Black attaches great importance. We refer to the provision for the payment of compensation for the services of the General Agent.

As already shown, the General Agent receives as compensation whatever sum the United States chooses to give. R. 342. Out of this sum he has to pay his administrative and general expenses. What is left is the actual compensation.

Compare this with the situation up to 1930, as disclosed by Senate Report No. 898, 74th Congress, 1st Session, prepared by Mr. Justice Black when he was a member of the Senate. The contracts at that time provided that the agent should be paid: "all voyage expense and also • • • a fixed percentage of the gross revenue". Report No. 898, p. 4. Subsequent to 1930, and up to 1935, when the report

was submitted, the agents received as compensation lump sum payments for every voyage. Report No. 898, p. 5.

With respect to these provisions, the Senate Report said, at page 4:

> "the losses were the taxpayers' and the Government's, the operations and the profits were, by and for private interests".

And, at page 39:

> "In the past, control of wages, salaries, working conditions, and profits of business subsidized by the United States has been vested in private individuals. In other words, while the Government has supplied, during the past decade, far more than 50 percent of the capital of enterprises engaged in foreign shipping, as the investor of the greater portion of this capital, it has not had that management and control which private investors would have had under the same circumstances."

And, at page 40:

> "As heretofore stated, Government losses persistently described by selfish interests as arising out of Government operations, have really resulted from private operations in the form of subsidized operating agreements variously called 'managing-operator agreements', 'lump-sum agreements', and 'mail contracts'. Under all of these, the private operators took the profits and the Government took the losses."

It is evident that those who wrote this report were of the opinion that the money received by the agents as compensation for services was actually the profits of a profitable business. Consequently, the operation was referred to as private operation. Just what they would have termed it if there had been a profit to the United States

after paying the agent's compensation, we need not pause to inquire. At all events, it was by regarding the operation in the light of its *results* that the Senators came to the conclusion that it was private operation.

We are not now concerned with the validity of that conclusion. We are concerned with showing that the facts on which it was based were entirely different from the facts attending the General Agency contract here. The General Agent obtains as compensation only what the United States chooses to give. If he does not like it, he can quit. If the United States thinks he is receiving too much or too little, it can change it at will.

This is not the way that profits are made by private interests. But, it is an excellent way for the United States to keep complete control of all profits, if profits there be.

Furthermore, compare the General Agency contract with the contract involved in the *Brady* case. *Brady* v. *Roosevelt Steamship Company*, 317 U. S. 575. That contract was made pursuant to the Merchant Marine Act of 1936, which was enacted after Senator Black's report. Therein, it was provided that the managing agent should receive his expenses only. And that is all he received. *And, furthermore, there was a profit over and above the expenses and it went solely into the pockets of the United States.*

For the year 1937, the profits were $531,370.44. For the year 1938, which was the year when Mr. Brady had his accident, the profits were $654,941.76. For the year 1939, the profits were $597,537.54.

This can be proved, if necessary. For the moment, we refer to a letter written by Roosevelt Steamship Company, Inc. on April 11, 1947, a copy of which is included among the exhibits in the booklet of exhibits accompanying this brief. It has been marked Exhibit C.

That was one of the reasons why we maintained in the *Brady* case that government operation was involved therein. It was operation for government profit, and it resulted in such profit. The agent did not receive a nickel above actual expenses. In the langauge of the economists, the United States was the entrepreneur.

In the *Quinn* case the Circuit Court said: (121 F(2) 190, 191):

> "We think our opinion in United States Shipping Board Emergency Fleet Corp. v. Greenwald, 16 F. 2d 948, which held a managing agent with similar powers liable for the death of a seaman, is applicable here, although in that case the managing agent had an interest in the profits. That the compensation appellant received from the Maritime Commission was relatively small is of no importance, for that was a matter of contract between it and the Commission, and cannot affect appellant's liability to third persons."

Thus, the Circuit Court, in effect, said that it made no difference that the managing agent in the *Quinn* case had no interest in the profits. Likewise, it made no difference to the Circuit Court that the compensation of the managing agent was relatively small (actually, it was nil). Mr. Justice Black, however, said on the argument that the method of payment of the agent *was* an important circumstance in determining who was the operator. It would seem that this is in disagreement with the view expressed by the Circuit Court of Appeals in the *Quinn* case. It is, therefore, gratifying to note this apparent difference of view and what appears to us to be support from Mr. Justice Black of our position that the General Agent was not an operator of the vessel, because, among other things, he did not and could not participate in the profits.

IV.

Mr. Justice Black also asked whether Senate Report No. 898, 74th Congress, 1st Session, did not refer to the contract involved in the *Brady* case as one providing for private operation.

Our answer follows:

It did not. Senate Report No. 898 was submitted before the contract in the *Brady* case was drawn. The report was dated 1935, and the *Brady* contract was not drawn until after 1936, pursuant to the authority of the Merchant Merchant Marine Act of 1936.

The contract referred to in Senate Report No. 898 was the so-called "Lump Sum Operating Agreement 1930", reproduced in Smith & Betters, U. S. Shipping Board, Its History, Activities, and Organization (1931) page 292. Paragraph 8 of that Agreement provided:

> "The managing operator shall, *at his own expense,* man, operate, victual, navigate, fuel and supply the vessels, and shall pay all port charges, pilotage, taxes, and other costs and expense."

The *Brady* contract was a special case. See United States brief, p. 7, note 6. It was a temporary arrangement designed to assist the Maritime Commission in operating in a route which was expected to be unprofitable. But, it became profitable, and the United States took the profits.

The law which was in force at the time that *Brady* contract was drawn provided that, where private operation was intended, it should be effected by means of a bareboat charter or demise. 46 U. S. C. 1195, 1196, 1197. By no stretch of the imagination could the contract in the *Brady* case be called a bareboat charter or demise. A bareboat

charterer is always an entrepreneur. In the *Brady* contract the Government took the entire risk of loss and the entire profit. It would seem to follow from this circumstance, alone, that the contract provided for Government operation.

The essential difference between the *Brady* case contract and the General Agency contract is that, in the case of the former, the United States operated the vessels *indirectly*, whereas, in the case of the latter, it operated them *directly*. Under the *Brady* case contract, such control as the Managing Agent exercised was exercised in his representative capacity only, and not as an employer. The Managing Agent, notwithstanding such control, was no more the employer of the crew than was the master, who also exercised control in a representative capacity. On the other hand, under the General Agency contract, the General Agent did not exercise any control of the vessel at all because all control was taken away from him by the terms of the contract and the orders of the United States.

The Merchant Marine Act of 1936 was passed in response to the recommendation made by Senator Black in Senate Report No. 898, at p. 41, that there be an end of operation of United States vessels by means of subsidies granted to private interests. The Senate Report recommended that "unless it be considered (as we consider it) in the public interest to provide for Government ownership and operation, that the system adopted provide for Government ownership with private operation."

Thus, Senator Black was, in a sense, the progenitor of the Merchant Marine Act of 1936, which provided primarily for private operation, and, secondarily, for Government operation, and of the contract in the *Brady* case which exemplified the latter.

If one disregards Senate Report No. 898 and the Merchant Marine Act of 1936, it is natural to regard the contract in the *Brady* case as the lineal descendant of the subsidy contracts which antedated it. So regarded, the contract in the *Brady* case will, inevitably and wrongly, appear as a subsidy contract, and the operation provided for therein may be referred to, mistakenly, as private operation.

In view of Mr. Justice Black's direct connection with the events leading up to the contract in the *Brady* case, such a result involves more than a mere mistake in the construction of a contract. It involves a denial of the paternity of Mr. Justice Black's own brain-child.

In this connection we refer to the two following paragraphs which we have found on page 39 of Senate Report 898:

> "True Government operation implies that the business is conducted without hope or possibility of private individual profit and with complete Government control of the wages, salaries, working conditions, and activities of those employed therein. In such Government operations, if there is profit it inures to the taxpayer, and if there is loss it is borne by the taxpayer.
>
> True private operation implies that private individuals supply the capital and operate and control the project for private profit, stimulated by the hope of profit to operate frugally and efficiently."

Tested by these standards, wartime operation as provided for in the General Agency contract was Government operation and nothing else. The General Agent did not have any hope or possibility of profit. The Government, in one way or another, controlled wages, salaries, working

conditions and the activities of all persons employed on its vessels.

In respect of the Steamship *Everagra*, which was a Panamanian vessel, (R. 72), the War Shipping Administration did this by means of Operations Regulation No. 69, issued on August 9, 1943. A copy of this Regulation, consisting of seven pages, is included among the exhibits in the booklet already referred to, and is marked Exhibit D. This Operations Regulation is in evidence in this case, pursuant to stipulation entered into at R. 298. It should end all controversy as to who physically controlled the *S.S. Everagra* and who employed the crew. We do not refer to the so called "technical" employment of the *Hust* case. We mean actual employment.

V.

Mr. Justice Black asked whether there had not been repeated attempts to cloak private operation as Government operation for the purpose of avoiding jury trials against private parties.

The answer follows:

We have already shown that this did not occur with respect to the General Agency Contract involved in this case. Brief, pp. 18-22. We now deal with the situation as it existed in the years before the General Agency Contract was drawn up.

Such a thing never occurred. There never was any occasion for it.

For many years the United States has been arranging for both private and Government operation. When it wished private operation, the United States used bareboat charters. When it wished Government operation, it used agency

agreements. Some agency agreements were drawn obscurely. In such cases it was difficult to know whether Government or private operation was intended. Therefore, the only way of ascertaining what was intended by the contract was to take evidence as to what the parties actually did thereafter. *Roberts* v. *U. S. S. B. Emergency Fleet Corporation*, 240 N. Y. 474.

If jury trials had depended on whether private operation or Government operation was involved, and anyone had had in mind avoiding a jury trial, surely a lawyer could have been found who could have done a better job of clearly providing for Government operation than was done in the contracts referred to.

But, jury trials did not depend on whether Government operation or private operation was involved. The Government operation of those days was by a wholly Government owned corporation, the Emergency Fleet Corporation. In the 1920's it was customary to sue this corporation, which was suable both in admiralty and at common law before a jury. In such actions it was customary, for good measure, to join the agent of the Fleet Corporation. No one cared whether the private agent was suable or not before a jury because the Fleet Corporation was always present, suable before a jury, and paying the bills. For an example, see *Shea* v. *Export Steamship Corp.*, 253 N. Y. 17, where counsel for the respondents here, then represented the plaintiff who was a seaman. From 1930, when the *Lustgarten* case (280 U. S. 320) was decided, until 1948 when the *Brady* case (317 U. S. 575) was decided, private parties were immune from suit. At least, everyone thought that they were, and proceeded, accordingly, to sue the United States in admiralty, pursuant to the Suits in Admiralty Act. It was not until the *Quinn* case was decided in 1941, 121 F. (2d) 190, that it

ever occurred to anyone that any attention should be paid to the provisions of the contract between the United States and its agents.

The *Quinn* case represents the old story of hard cases making bad law. If the tort in the *Quinn* case had been maritime, Mrs. Quinn could and would have sued the United States under the Suits in Admiralty Act, and there would never have been any occasion for holding that the agent of the United States was operating the vessel and, therefore, liable. But, as it happened, Mrs. Quinn's husband had been killed when the vessel struck a bridge on which he was standing, and Mrs. Quinn could not sue the United States under the Suits in Admiralty Act because it was not a maritime tort.* Therefore, she sued the agent, and the essential question was whether Mrs. Quinn was to receive any compensation at all for her husband's death. A result favorable to Mrs. Quinn was accomplished by holding that the agent was the operator of the vessel. In the opinion of those who were immediately concerned with the question, this was contrary to fact, and required correction. Two attempts were made to correct it in this court, but this court declined to decide the question. The only other way in which the error could be corrected was to make future contracts so clear in their meaning that the same mistake would not be repeated. This was the reason, in part, for the meticulous phraseology of the General Agency contract.

By the same token, it was certain careless and obscure phraseology contained in the *Brady* contract, which was the same as the *Quinn* contract, which led to the mistaken conclusion that it provided for private operation.

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* Cases involving non maritime torts, such as in the *Quinn* case, are now taken care of by the Federal Tort Claims Act, 28 U. S. C. 931.

This is all there is to it, and, even though our adversaries might wish to satisfy groundless suspicions, it is impossible in this instance to do so.

POINT III.

FURTHER ANSWERING THE QUESTIONS OF MR. JUSTICE RUTLEDGE.

I.

Mr. Justice Rutledge asked whether Article 16, in conjunction with Article 14, might have an important bearing on the question of who was in control of the *SS. Everagra.* The substance of Article 16 is as follows:

> "The United States shall indemnify • • • the General Agent against any and all claims and demands (including costs and reasonable attorneys' fees in defending such claim or demand whether or not the claim or demand be found to be valid) • • • for injury to persons or property arising out of or in any way connected with the operation or use of said vessels or the performance by the General Agent of any of its obligations hereunder, including but not limited to any and all claims and demands • • • for claims for damages for personal injury or loss of life and claims for maintenance and cure."

Article 14 requires the General Agent to "arrange for the repair of the vessels" and also to "exercise reasonable diligence in making inspections and obtaining information with respect to the state of repair and condition of the vessels, and so advise the United States from time to time, in order that the United States may satisfy itself that the vessels are being properly maintained, and shall cooperate with representatives of the United States in making any

inspections or investigations that the United States may deem desirable."

Our answer follows:

We gather that the significance which Mr. Justice Rutledge may see in the foregoing lies in the following words from Article 16: "arising out of, or in any way connected with, the operation or use of said vessel". Mr. Justice Rutledge seemed to emphasize this at the time of the argument.

We agree with Mr. Justice Rutledge that it is inferable from the provision for indemnity that the parties contemplated that there might be claims against the General Agent arising out of or connected with "the operation or use of said vessels". But, we do not think that it is inferable either from this or other words of Articles 14 and 16 that the parties contemplated that the operation was to be by the General Agent.

On the contrary, Article 16 reflects the fact that the parties contemplated that, notwithstanding that the operation was by the United States, claims might be made against the General Agent as if he were the operator when, nevertheless, he was not. This the parties indicated when they provided for indemnity with respect to counsel fees in defending invalid claims. This they also indicated when they provided for indemnity for claims arising out of the "performance by the General Agent of any of its obligations hereunder". The latter was all-embracing so far as the General Agent's own liabilities were concerned. The General Agent could not have a liability which did not arise from the performance of his obligations. It follows, therefore, that, when the parties referred to claims connected with the "operation or use of said vessels", they were referring to claims made against the General Agent, but

arising out of the operation of the vessel by the United States, and particularly the expenses of defending such unfounded claims.

In this connection reference should be made to the contract which the United States had with the Berth Agent, Moore-McCormack Lines, Inc. At pages 20 and 21 of our main brief, we have referred to the fact that, at the time of the accident, the agent which had charge of the United States' interests with respect to berthing and loading the *SS. Everagra* was not Thor Eckert, respondents herein, but Moore-McCormack Lines, Inc., the Berth Agent. A copy of a Berth Agent's contract is found at page 367 of the Compilation of Standard Contract Forms of the War Shipping Administration, which is in evidence in this case as Plaintiff's Exhibit 7.

The Berth Agent, it will be seen, undertook to "conduct the business of vessels assigned to it by the United States from time to time" Article I. It also undertook to "Perform all of the customary duties of an agent in conducting the business of the vessels subject to this Agreement, subject to the orders of the United States as to voyages, cargoes, priorities of cargoes, charters, rates of freight and other charges and as to all matters connected with the use of the vessels; or in the absence of such orders, the Berth Agent shall follow reasonable commercial practices;" Article 3A(a), Plaintiff's Exhibit 7, page 368.

Furthermore, it was provided in Article 8 that "The United States shall, without cost or expense to the Berth Agent procure or provide insurance against, or shall assume all insurable risks of whatsoever nature or kind relating to the vessels assigned hereunder including, but without limitation, marine, war and P. & I. risks, and all other risks or liabilities for breach of statute and for damage

caused to other vessels, persons or property, and shall defend, indemnify and save harmless the Berth Agent against and from any and all loss, liability, damage and expense (including costs of court and reasonable attorneys' fees) on account of such risks and liabilities, to the extent not covered or not fully covered by insurance." Plaintiff's Exhibit 7, page 370.

Here, again, one may entertain the mistaken idea that a provision for indemnification implies a liability arising out of operation by the Berth agent. Furthermore, if one is attracted by labels, rather than by substance, one can be misled by the words of the preamble of the Berth Agency contract wherein the Berth agent is referred to as an operator or Berth operator. Plaintiff's Exhibit 7, page 367. However, in view of the fact that, necessarily, there were as many Berth Agents with respect to each ship as there were ports at which each vessel loaded, it can be seen readily that the suggestion that a Berth Agent was an operator in the commercial sense involves the absurdity of a multiplicity of operators. The choice, therefore, is between two alternatives:—either the ships were physically operated by General Agents and as many Berth Agents as there were ports at which they loaded cargo, or, as we contend, by the United States with the assistance, as to business matters, of the General Agents and as many Berth Agents as the United States chose to employ. Since the first alternative is absurd, the second must be true.

II.

Mr. Justice Rutledge asked whether there had been any instance where the United States had shown bad faith in responding to its obligation to indemnify the General Agent.

Our answer follows:

We know of no instance of bad faith. But, the good or bad faith of the United States is not exactly relevant to the point which counsel was endeavoring to make on the argument. That point was that the General Agent, even though he had a contract of indemnity with the United States, and even though he was insured, had a very practical interest in not being held liable at all.

If the United States, acting either as indemnitor or insurer, refuses to indemnify or insure, on grounds asserted as adequate by the United States, it makes no difference to the General Agent whether the representatives of the United States are acting in good faith or not. The result is the same. Moreover, if the representatives of the United States indicate from time to time that, on such occasions, and on such grounds as may seem appropriate to the United States, they will deny indemnity, the General Agent's position, to say the least, is uncomfortable.

Counsel made the statement on the argument that the United States had already indicated that a contract for indemnity with the United States is not such a "gold bond" as it appears to the uninitiated. General Agents have a substantial interest, not only as respects plaintiffs, but as respects the United States, in being held not liable as operators, and, therefore, not subject to the risk of having their claims for indemnity denied whenever it suits the United States to do so. As proof of this, we offer the following

copies of letters which passed between the United States and one of its General Agents, United States Lines.

The first is a letter written on March 30, 1945, by the Department of Justice to the United States Lines with respect to claims arising out of the explosion of the *SS. Quinault Victory,* which took place at Port Chicago on July 17, 1944. It is marked Exhibit E and is contained in the booklet of Exhibits already referred to. In the fifth paragraph of this letter the United States coolly offered to defend the General Agent in proceedings pending in Portland, Oregon, but, so to speak, with its fingers crossed. The United States specifically undertook to do this "without prejudice to whatever situation is disclosed as the defense develops".

Attention is also called to the next to the last paragraph, wherein the United States, so to speak, washes its hands of the General Agent in case it should appear that the General Agent was "liable for its own torts".

An ordinary commercial underwriter would never dream of providing for the defense of its assured on such a basis. Ordinarily, when a commercial underwriter takes over the defense of his assured, all questions as to coverage are waived. But, not so with the United States. The United States, undisturbed by the conflicting motives necessarily involved, undertook, on the one hand, to be the lawyer for the General Agent in defending him against the claims of third parties—i.e., in asserting that he was not negligent—while, at the same time, it reserved to itself all advantages which might result to the United States from a finding that he was negligent.

The next letter is a letter written by the Department of Justice on August 23, 1945, with respect to the same matter. It is marked Exhibit F. We call attention to the fifth para-

graph, wherein the United States again took the position that the Government would be released from its contractual indemnity in case "a trial might produce evidence that your company's servants were negligent in some one or more respects named in the contract."

The same considerations apply to insurance policies. It is all very well to say that a General Agent has nothing to worry about, whether he is held to be the operator or not, since, in any event, an insurance company will pay the bill. But, it is not so simple as that.

The conclusion that the General Agent is fully protected by insurance rests on the blithe assumption that insurance companies are generous and willing victims. This is contrary to fact. Whether a General Agent or anyone else has valid insurance which will result in adequate reimbursement is a question which cannot be stated generally, but can be stated specifically only with respect to each individual case. Furthermore, it can not be stated at all until one has examined the policy.

It so happens that the policy is in evidence in this case. It will be found in Compilation of Standard Contract Forms of the War Shipping Administration, Plaintiff's Exhibit 7, page 807 *et seq.* It will be noted that the insurance in question is not simply insurance of the General Agent, but insurance of "The United States of America, acting by and through the Administrator, War Shipping Administration, and its General Agents and Agents under Service Agreements, Berth Agents and Sub-Agents acting on their behalf, and Owners, hereinafter collectively called the Assured". Plaintiff's Exhibit 7, page 807. It will be noted also that the insurance indemnifies "the assured against any loss • • • by reason of the fact that the assured is the owner or bareboat charterer, or the General Agent or

agent, or berth agent, or sub-agent of the owner or bareboat charterer of the insured vessel". Plaintiff's Exhibit 7, page 808.

This insurance does *not* insure against many of the liabilities arising out of the operation of vessels. It is not designed to do so. True, it is designed to cover most of the liabilities arising out of operation of vessels, but there are a number of them which are not covered at all. We will cite just one to prove the point—*i.e.*, liabilities to persons, not members of the crew, while they are on piers alongside of which the vessel may be docked. This is not shipowners' liability within the meaning of the policy, and, yet, the shipowner, may be liable to persons on the dock who are using it as a means of access to the ship.

There is no doubt that when the insurance was provided for in the contract it was contemplated that the General Agent might have liabilities for which there should be insurance. No one doubts that, insofar as a General Agent may be guilty of a negligent *act* in respect of the performance of any of the services required of him under the General Agency Agreement, he may be liable therefor. The insurance in this case which insures him only "by reason of the fact that the assured is the * * * General Agent" was designed to cover such liabilities and no other.

Thus, the General Agent has a real and substantial interest in maintaining the position, which is the true position, that he was not the physical operator of such United States-owned ships as the *Evcragra*. The uncertainty of his ultimate financial position is derived not only from the fact that he is insured as a General Agent—what does that mean? —as from the fact that the insurance which has been provided is incomplete, and, thus, leaves him uninsured with respect to substantial matters. If anyone should take the

risk in respect of these matters, it should be the United States, which is the actual operator, and not the General Agent, who is not.

At the present time suits for personal injury are pending in which the insurance company has denied coverage of the General Agent, although the liability of the General Agent, if it exists at all, arises out of service performed for the United States as required by the General Agency Contract. If the General Agent should be held liable, his only possibility of recoupment will be by means of suing the insurance company after his liability is established, or by way of indemnity from the United States, which, as already shown, may also lead to litigation.

As to the necessity for litigation in order to collect from the United States on its written promises to pay insurance claims, see *United States* v. *Leahy*, 148 F. (2d) 462. See also *United States Lines Company* v. *United States of America*, 52 F. Supp. 758.

In the first of these cases the United States claimed that its insurance undertaking was *ultra vires*. There have been at least fifty suits brought against the United States as a result of the United States' repudiation of its promise to pay in full its insurance obligations. Essentially, the defense of the United States was that the contract was made without authority. Such actions have been compromised, but not for the full amount. From the amount so received, the private interests were obliged to deduct expenses and attorneys' fees.

What has happened before can happen again.

In *Angelus Milling Company* v. *Noonan*, 144 F. 2d. 469, aff'd 325 U. S. 293, Judge Learned Hand said, at page 472:

"It makes no difference to the taxpayer what was his mistake; in either case he awakes to learn that it is never safe to put his trust in officials * * *; but he who deals with the Government must dot his i's and cross his t's, and if he assumes that he may rely on the ordinary rules which apply as between individuals, he is doomed to disappointment."

In short, the General Agent has a contract with the United States and a contract with an insurance company—*i.e.*, choses in action. These may or may not be valuable. The General Agent would be much better off if he were not liable in the first place, and were not burdened with the risk of litigation against the United States or underwriters. If, on the facts of this case, he was not the actual physical operator of the vessels, there is no reason in justice to treat him as such on the false assumption that he is fully insured and, therefore, has no vital interest at stake.

Respectfully submitted,

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APPENDIX.

DEPARTMENT OF JUSTICE

WASHINGTON, D. C.

JFS:LC
61-14938

Apr. 28, 1947

Raymond Parmer, Esq.
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New York, New York

Sir:

Attached is a letter received from the General Counsel, United States Maritime Commission, furnishing information requested by the Supreme Court in the course of the oral argument of *Caldarola* v. *Moore-McCormack Lines et al.*, October term, 1946, No. 625.

In accordance with your request that the Department of Justice assist you in procuring this information, this letter is furnished for use as an appendix to the reply brief which you have been authorized to file in that case.

Respectfully,

For the Attorney General

JOHN F. SONNETT
Assistant Attorney General

Enclosure
No. 320713

UNITED STATES MARITIME COMMISSION

WASHINGTON

Apr. 28, 1947

Honorable John F. Sonnett
Assistant Attorney General
Department of Justice
Washington 25, D, C.

Sir:

This has reference to the request of your Department in connection with the case of *Caldarola* v. *Moore-McCormack Lines, Inc., et al.*, that the Maritime Commission, as successor to the United States Shipping Board and the War Shipping Administration, supply additional information for the use of the Supreme Court. It appears that you desire to be informed why the War Shipping Administration, instead of entering into managing-operator agreements, such as had been used by the Shipping Board and the Maritime Commission from the close of wartime government operation in 1920 until the final sale of the Government's merchant fleet in 1940, decided to adopt service agreements whereby it employed existing steamship companies as its agents to conduct the business of the vessels. You also request an explanation of the differences between the standard form service agreement GAA 4-4-42 adopted by the War Shipping Administration and the former managing-operator agreements, together with a statement as to the manner in which the vessels were operated and serviced under the various integrated contracts of the War Shipping Administration.

CONGRESS AUTHORIZED DIRECT GOVERNMENT OPERATION.

It must be understood at the outset that direct government operation of the government merchant fleet was

believed indispensable to the war effort in both World Wars. It was accordingly specifically authorized by the Congress and the arrangements which were made for direct government operation with the assistance of experienced steamship companies as ships' husbands for the servicing of the vessels and as berth agents for the handling of the port services arising out of their operations on the various routes were deliberately chosen from that point of view. As is evident from a comparison of the new standard form agreements, this type of operation constituted a significant change from the method of operating government vessels which had been in force from January 1920 until the sale of the last of the government lines in May 1940 and marked a return to the direct government operation of World War I.

The effect of the old peacetime operation, particularly subsequent to 1929, is best summarized by the Shipping Board in its Annual Report for 1929. There, in explaining the purpose of the operating agreement which it had adopted, the Board stated (p. 95):

> "By this plan, the operator assumes complete physical and financial control of the operations of the line, and the Merchant Fleet Corporation confines its activities to periodic inspections covering the maintenance of service in accordance with the contract and the physical condition of the ships. For the services of the operator in maintaining the line, a lump sum amount is paid, the amount to be determined for each line by analysis of recent operating results. This form of agreement places the managing operator upon as nearly a privately owned operating basis as is practical and should pave the way for the eventual sale of the lines."

This referred to what was ultimately known as the "Lump Sum Operating Agreement, 1930" which was considered in the reports of the Black Committee (S. Rep. 898, 74th Cong., 1st Sess.) and the Comptroller General (H. Doc. 217,

72d Cong., 1st Sess.). Its text is printed in full in Smith and Betters, *U. S. Shipping Board, its history, activities and organization*, pp. 293-302. Earlier forms are printed in S. Doc. 38, 67th Cong., 1st Sess., pp. 60-65.

The normal peacetime scheme of operation which, following the Black report, Congress directed in the Merchant Marine Act, 1936, required the Commission to arrange for the charter of the government-owned merchant fleet by private steamship companies. Section 704 (46 U. S. C. 1194) provided:

> "All vessels transferred to or otherwise acquired by the Commission in any manner may be chartered or sold by the Commission pursuant to the further provisions of this Act. All vessels transferred to the Commission by this Act and now being operated by private operators on lines in foreign commerce of the United States shall be temporarily operated by the Commission for its account by private operators until such time and upon such operating agreements as the Commission may deem advantageous, but the Commission shall arrange as soon as practicable to offer all such lines of vessels for charter as hereinafter provided, preference to be given to present operators, and all operations of the Commission's operation by private operators shall be under such operating agreements discontinued within one year after the passage of this Act."

But in order to assure operation of lines which the Commission might deem essential, but for which it might be impossible to find private operators willing to assume the financial risk of operation under bareboat charter, Congress provided in Section 707, as amended (46 U. S. C. 1197), that the Commission itself might operate such lines through private operators under such operating agreements as the Commission might find advantageous. It was under exceptional arrangements of this character that the special operating agreements with the Roosevelt, South-

gate-Nelson and two other operating companies were continued by the Commission until final sale of the government lines in 1940. And it was these special agreements which were involved in the cases of *Brady* v. *Roosevelt S.S. Co.*, 317 U. S. 575, and *Quinn* v. *Southgate-Nelson Co.*, 121 F. 2d 190, cert. den. 314 U. S. 682. The text of the special Roosevelt agreement is printed in full in the Brady record (October Term, 1942, No. 269, pp. 21-32).

In order to meet potential war conditions Congress, by the Act of August 7, 1939, c. 555, 53 Stat. 1255 (46 U. S. C. 1242(e)), amended the Merchant Marine Act and conferred special powers upon the Commission with respect to vessels requisitioned or purchased in case of national emergency. In particular Congress authorized the Commission "to repair, recondition, reconstruct, *and operate*, or charter for operation, any vessels acquired" under such authority. By Section 4 of the Act of June 6, 1941, c. 174, 55 Stat. 244 (50 Appx. U. S. C. 1274), Congress further recognized the developing national emergency and expressly directed that any vessels acquired or made available to the Commission might be "operated by the Commission upon such terms and conditions as it may deem desirable and in the public interest, giving primary consideration to the needs of national defense". Finally, following the outbreak of hostilities, President Roosevelt by Executive Order 9054 of February 7, 1942 (3 C. F. R. 1943 Cum. Supp. 1086), issued pursuant to the First War Powers Act of December 18, 1941, c. 593, 55 Stat. 838 (50 Appx. U. S. C. 601), established the War shipping Administration under the direction of an Administrator, Paragraph 2 of that order directed the administrator to control the "operation, purchase, charter, requisition and use of all ocean vessels under the flag or control of the United States" with the exception of vessels under the control of the military or naval authorities. By paragraph 3 it also transferred to the Administrator all duties and authority with respect to the operation of vessels which had previously been conferred by law upon the Maritime Commission.

Purpose of Direct Government Operation.

The mandate for wartime operation thus granted the War Shipping Administration was entirely different from the peacetime functions of the Shipping Board and the Maritime Commission as directed by earlier legislation culminating in the Merchant Marine Act, 1936, and carried out by means of the operating agreements employed from 1920 to 1940. On the contrary, the type of operation authorized was analogous to the direct government operation followed during World War I by the Shipping Control Committee of the Shipping Board with the aid of the Division of Operations of the Fleet Corporation. Then President Wilson, by Executive Order 2664 of July 11, 1917, issued pursuant to the emergency provisions of the Act of June 15, 1917, c. 29, 40 Stat. 182, had conferred similar authority upon the Shipping Board to assume "the operation, management and disposition" of all vessels acquired by the United States. The Board, in its turn, by resolution of February 11, 1918 (H. Rep. 1399, 66th Cong., 3d Sess., p. 32), had created the Shipping Control Committee "empowered to manage, control, distribute and allocate all tonnage now subject or which hereafter may become subject to the control of the United States Shipping Board by ownership, charter or otherwise". And the direct government wartime operation that followed is now history (see Crowell and Wilson, *Road to France*, pp. 377-378; Smith and Betters, *U. S. Shipping Board, its history, activities and organization*, pp. 24-25, 29-30.

It should be common knowledge that the basic reason for the War Shipping Administration following a plan of operations whereby it manned and navigated the Government's vessels was the conviction that it was essential to the conduct of the war to make the navigation and physical management of the vessels afloat an exclusively government operation. But equally it was desirable to take advantage of the existing contacts and experienced personnel of steamship companies for servicing the shoreside needs and admin-

istrative affairs of the vessels and obtain the benefit of their existing agreements with the maritime unions for procuring masters and crews. From a review of the War Shipping Administration files it would seem that the following points were deemed particularly essential:

1. Insure immunity from foreign and local inspection, regulation, and taxation for the vessels and their operation.

2. Retain direct control of the routing, navigation and physical management of the vessels and of their masters and crews but not necessarily of their procurement for employment.

3. Provide a mechanism for direct control of fueling, supplying, repairing and similar services and for immunity from foreign and local regulation and taxation of such activities.

These points could be best attained only by direct government operation. Operation of the vessels by independent contractors would not fulfill the requirements.

When War Shipping Administration assumed the task of operating the Government's merchant fleet, the then existing scheme of the Government was to bareboat charter its vessels to private owners. The onset of war led to a general program of requisition and to acquisition of a vast number of vessels of all types through purchases and the stepping up of our construction program. The problem presented under these new conditions was how to carry out the mandate granted by Executive Order 9054 "to control the operation * * * and use of all ocean vessels" as a coordinated major governmental program while at the same time taking advantage of the existing organizations in the various ports which the steamship lines had created. Efficient wartime operation required speed and secrecy. It was indispensable to escape the detailed inspections, reports and accounting which foreign, and to some extent local, governments imposed on private vessel operation in

aid of their police, regulation and taxation powers. Only direct government operation would support the claim of sovereign immunity and permit escape from such delays and publicity. But efficient operation just as obviously dictated a policy of full utilization of the technical skill and facilities of shipping organizations, which had been painstakingly encouraged by the Commission's aid over a long period of years, precisely in order that they might be utilized by the public in just this type of emergency. Such organizations, developed in peacetime by private shipping companies, consist of highly skilled personnel trained to work smoothly and closely together. Their technical personnel have complete familiarity with the terminals, connecting carriers, loading and unloading conditions, as affected by port, sea and weather conditions, and with all other problems inherent in overseas transport in the various trades. They are familiar as a team with the various techniques and skills of such shore side matters as towage, wharfage and stevedoring practices, maintenance and voyage repairs and countless other minor port operating details, which, unless efficiently handled, result in substantial loss of time, money and ship-space. Such organizations also have access to a supply of ship and shore personnel as a result of their union agreements and other connections. It was obvious that the only workable solution was a two-fold division of duties: the navigation and physical management of the vessels afloat was to be carried out by ship masters acting directly as agents or employees of the United States and in exclusive control of their vessels and crews; the port services, the husbanding of the vessels and the details of shore side administration were to be carried out by existing shipping companies acting not as independent contractors but solely as agents for the United States.

The nature of such agency arrangements was especially important in connection with foreign taxation and regulation. For example, not even an act of Congress might have been sufficient to preserve immunity of the vessels if the general agents were made independent contractors and placed in possession of the vessels. Cf. *Mexico* v. *Hoffman*,

324 U. S. 30, 37. As Admiral Land stated in a circular instruction of June 10, 1942, addressed to all agents and general agents with respect to tax immunity:

> "When the forms of Service Agreements (GAA and TCA) were drafted, and later when they were approved by me for use as standard forms, it was contemplated that Agents and General Agents who executed them would act as agents for the United States, and not as independent contractors, in conducting the business of the vessels allocated to them (see Articles 1 and 2). It was also contemplated that, since the agents were authorized to make purchases necessary to the maintenance, management, and operation or conduct of the business of the vessels, the purchases would be made in the name of the United States as principal, that title to the goods purchased would vest in the United States, and that the United States, and not the Agent, would be obligated to pay the purchase price and its credit would be pledged therefor."

See also previous circular instruction, dated May 19, 1942, by the Director of Fiscal Affairs.

Of all the various aspects covered by the discussions that attended the drafting of the service agreements necessary to carry out the plan for wartime operations, the question of whether the crews were to be employees of the United States or of the general agent received most particular attention. Aside from the propriety of a Government agency, as employer, negotiating directly with labor unions or entering into collective bargaining agreements, the practical difficulties of so doing were almost insuperable due to the large number of labor organizations and the consequent variations as to wages, working conditions and other matters which existed in the maritime industry as a result of a long history under private operation. It was recognized that for at least the early years of the war, the requisitioned vessels would represent a vast majority of those under government control and the transition from

private to direct government operation could be best achieved only by arrangements which provided for a minimum disturbance of existing collective bargaining relationships. On the other hand, there was no doubt that as the general agents would not be owners nor bareboat charterers of the vessels they could not claim the benefit of the limitation of liability acts (46 U. S. C. 181 *et seq.*) as the law then stood. Compare Section 4 of the War Shipping Administration (Clarification) Act, (50 Appx. U. S. C. 1294) extending the benefits of the acts. General agents, while willing to assist in procurement, were reluctant to accept the unlimited liability which would result from the masters and crews being their agents or employees. Moreover it was believed that crews would have greater sense of responsibility and would be more likely to refrain from strikes and other work stoppages if they were employees of the United States. Finally, only if the masters and crews were government employees could the United States be certain of its right to invoke sovereign immunity abroad and to insist at home that all litigation involving the navigation and management of the vessel should be in the admiralty courts where necessary wartime secrecy could be preserved.

Ultimately a plan was developed similar to that stated in Section 79, comment a, of the Restatement of Agency. It was determined that the general agent, acting as agent for the Government, should procure masters and crews to man the vessels. It was to be expressly provided that they should be procured pursuant to the applicable union agreements and in accordance with customary commercial practices. It would thus be possible to retain the advantage of existing union agreements without sacrificing the advantages arising out of the status of the masters and crews as government employees subject to the exclusive control of the United States.

1942 Forms of Agency Agreements.

Pursuant to the plan thus evolved, the War Shipping Administrator adopted forms of service agreements whereby

existing steamship companies were appointed general agents to husband vessels to be assigned to them and operators of existing steamship lines were appointed berth agents to handle the cargo activities and other port services required by vessels assigned to the routes established. Those service agreements were promulgated by the Administrator in General Order No. 21 of September 22, 1942 (7 Fed. Reg. 7561), and its supplements. An examination of the texts of the two agreements and a consideration of the complementary functions which they assign to the general agent and berth agent in attending to the service of the vessel on shore shows conclusively that neither agent is in control of the vessel but that the United States alone, as the principal both of the vessel's master and of the general agent and berth agent has full control.

The general agency agreement, form GAA 4-4-42, in effect at the time Caldarola was injured (printed in Document 4, Plaintiff's Exhibit 7, pp. 326-336), provided in pertinent part as follows:

> "Article 1. The United States appoints the General Agent *as its agent and not as an independent contractor, to manage and conduct the business of vessels* assigned to it by the United States from time to time.
>
> "Article 2. The General Agent accepts the appointment and undertakes and promises so *to manage and conduct the business for the United States*, in accordance with such directions, orders, or regulations as *the latter has prescribed*, or from time to time *may prescribe* • • •.
>
> "Article 3A. To the best of its ability, the General Agent shall *for the account of the United States:*
>
> (a) Maintain the vessels in such trade or service *as the United States may direct;*
>
> (b) Collect all moneys due the United States • • • and account to the United States for all moneys collected or disbursed • • •;

(c) Equip, victual, supply and maintain the vessels, subject to such directions, orders * * * and inspection *as the United States may from time to time prescribe;*

(d) * * * The Master *shall be an agent and employee of the United States and shall have and exercise full control, responsibility and authority with respect to the navigation and management of the vessel.* The General Agent shall procure and *make available to the Master for engagement by him* the officers and men required by him to fill the complement of the vessel * * * *The officers and members of the crew shall be subject only to the orders of the Master.* All such persons shall be paid in the customary manner with *funds provided by the United States hereunder.*"

It was complemented by the berth agency agreement, form BA 12-29-43, in effect at the time Caldarola was injured (*ibid.*, pp. 367-374), which provided in pertinent part as follows:

"Article 1. The United States appoints the Berth Agent *as its agent and not as in independent contractor, to conduct the business of vessels* assigned to it by the United States from time to time.

"Article 2. The Berth Agent accepts the appointment and undertakes and promises so *to conduct the business for the United States*, in accordance with such directions, orders or regulations *as the United States has prescribed*, or from time to time may prescribe. * * *

"Article 3A. Unless otherwise directed by the United States, the Berth Agent in all cases shall, to the best of its ability, for the account of the United States:

"(a) Perform all of the customary duties of an agent in conducting the business of the vessels subject to this Agreement, subject to the orders of the

United States *as to voyages, cargoes, priorities of cargoes, charters, rates of freight and other charges and as to all matters connected with the use of the vessels;* • • • . .

"(b) Collect all moneys due the United States under this Agreement and deposit, remit, or disburse the same in accordance with such regulations as the United States may prescribe from time to time, and account to the United States • • •

"(c) *Provide and pay for all fuel, fresh water, stevedoring and other cargo handling expense, port charges, wharfage and dockage, pilotages, agencies, canal dues, commissions, and consular charges,* except those pertaining to the Master, officers and crew, • • • Provided, That, where the United States has entered into agreements for any of the foregoing items (such as for stevedoring and supplying fuel), the Berth Agent shall see that the items are furnished pursuant to the provisions of such agreements and shall make the necessary arrangements with the District Manager, or other representative of the United States therefor;

"(d) *Issue or cause to be issued to shippers customary freight contracts and bills of lading in the form prescribed by the United States,* and prepare manifests and other cargo documents. Where appropriate, issue or cause to be issued to passengers customary passenger tickets in the form prescribed by the United States."

In view of the fact that as to some of the vessels the same person might act both as general agent and as berth agent and the fact that vessels at times would be in ports where it would be necessary for the berth agent to perform the duties of husbanding the vessel, a certain overlapping of duties and powers was necessarily provided for. However,

none of these powers infringed upon the absolute control of the United States through the master over the navigation and physical management of the vessel. No conflicts could arise from this overlapping of duties between the general agent and the berth agent because they were avoided or resolved in practice by specific orders of their common principal the United States. The clear line of authority vested in the master from the United States as contrasted with the overlapping duties of general agents and berth agents, indicate clearly that the master was directly responsible to the United States and not to the general agent or berth agent.

DIFFERENCE FROM COST-PLUS CONTRACTOR AGREEMENT.

Analysis of the differences between the general agency agreement, on the one hand, and the agreements which turned the vessels over to private contractors for operation, on the other, confirms that the control of the navigation and physical management of the Government's vessels, as distinct from services in attending to their business on shore, was in the United States and that the general agent no more than the berth agent was permitted to have any control over the navigation and physical management of the vessels. As typical of the latter group of contracts we may take that with the Roosevelt Steamship Company, which was before the court in the *Brady* case, and the "Lump Sum Operating Agreement, 1930," which was before the Black Committee in 1935. As indicated above, the texts of both are readily available to the Court.

Article 1 of the general agency agreement expressly states that the Government appoints the general agent "as its agent and not as an independent contractor," to "manage and conduct the business of the vessel". On the contrary, paragraph 1 of the special Roosevelt agreement provides that the "managing agent" is appointed "to manage, *operate* and conduct the business of the line"; and paragraph 3 states that the vessels are allocated "for management and *operation*". The 1930 agreement em-

ployed a similar form and in addition in paragraph 14 provides that the "managing operator" shall "assume control" of the "management and *operation* of the vessels." Significantly, such provisions are carefully excluded from the general agency agreement.

Article 3A(a) of the general agency agreement provides that the general agent shall maintain the vessels in such trade as the United States may direct. The Government is thus entirely free to issue and did issue detailed orders concerning routes, voyages, cargoes, rates of freight and all similar matters. The special Roosevelt agreement, on the other hand, within the limitations of paragraphs 4 and 5, concerning the number of sailing on the precise trade routes specified and the necessity for contracting in the trade name of the line, leaves the entire operation to the contractor's discretion. Paragraph 5 of the 1930 agreement is similar in effect. Both leave the times and conditions of the sailings entirely to the discretion of the operator.

Article 3A(c) of the general agency agreement requires the general agent to "equip, victual, supply and maintain the vessels" as directed by the United States and 3A(d) requires the general agent to procure the master and crew. But it is provided that, once procured, the master "shall be an *agent and employee of the United States* and shall have and exercise full control, responsibility and authority with respect to the navigation and management of the vessel." and that "the officers and members of the crew shall be subject only to the orders of the master". Finally it directs that they shall be paid with funds provided by the United States. No corresponding language exists in the old agreements. Paragraph 7 of the Roosevelt agreement requires the managing agent to "*man*, equip, victual, supply and *operate* the vessels." Paragraph 8 of the 1930 agreement provides, "The Managing Operator shall, *at his own expense, man, operate*, victual, *navigate*, fuel and supply the vessels, and shall pay all port charges, pilotage, taxes and all other costs and expenses." The only restriction upon the operator in the old forms is that the licensed officers and

chief steward are to be subject to the Government's approval.

Article 8 of the general agency agreement states that the United States will provide insurance against all insurable risks, including marine, war and protection and indemnity risks, "which insurance shall include the general agent and the vessel personnel as assureds." Paragraph 14 of the special Roosevelt agreement and paragraph 20 of the 1930 agreement, on the other hand, required the Government to provide all marine insurance, but required the operator to provide all protection and indemnity and similar forms of insurance which the Government may deem necessary. Protection and indemnity insurance covers the vessel's liability for personal injury to crew members and others and for damage to cargo. The function of providing it is ordinarily placed upon the party responsible for the navigation and management of the vessel. The retention in the United States, by the general agency agreement, of the function of providing protection and indemnity insurance is significant as showing that the navigation and physical management of the vessel is completely divorced from the functions of the general agent in husbanding the vessel and attending to its shoreside activities.

Article 14 of the general agency agreement provides that, unless otherwise instructed and "subject to such regulations, instructions, or methods of supervision and inspection as may be required or prescribed by the United States," the general agent shall "arrange for the repair of the vessels" and cooperate with representatives of the United States in making any inspections or investigations that the United States may deem desirable. Article 3A(e) imposes a general duty of maintenance. Paragraph 11 of the special Roosevelt agreement similarly requires the managing agent to "exercise reasonable care and diligence to maintain the vessels". But paragraph 12 of the Roosevelt agreement further provides, that the Government shall have the right "to survey any of the vessels operated by the managing agent hereunder to satisfy itself that they are being properly maintained" and requires the managing agent "to give

such representatives as the owner may designate from time to time full, free and complete access at all reasonable times to all parts of the vessels." Paragraph 9 of the 1930 agreement provides that "The Managing Operator shall, at its own expense * * * keep said vessels * * * in substantially the same condition as when delivered," and paragraph 5 reserves the right for the Government to survey the vessels at any time. Such provisions for access to the vessels although essential in the earlier agreements when the United States was not in possession of the vessels, was obviously unnecessary in the 1942 general agency agreement since the master "as agent and employee of the United States", exercising full control "with respect to the navigation and management of the vessel," would hold possession of the vessel for the United States and subject to its access at all times.

The financial arrangements for the vessels also tend to confirm that under the general agency agreement the vessels are in the exclusive control of the Government. The Lump Sum Operating Agreement, 1930, provides that the managing operator shall pay all expenses of operation and in paragraph 18 states that he "agrees to assume for his own account all losses incurred in the operation" and that any profits shall be his property. The operator's compensation is fixed by paragraph 21 at a lump sum for each voyage. The Roosevelt agreement, on the other hand, provides in paragraphs 6, 7 and 19 for an ordinary cost-plus-fixed-fee type of operation. Article 7 of the general agency agreement by contrast, not only requires the United States to reimburse the general agent "for all expenditures of every kind made by it in performing, procuring or supplying the services, facilities, stores, supplies or equipment as required hereunder," but, moreover, provides that the United States may advance moneys "to provide for disbursements hereunder in accordance with such regulations" as it shall prescribe. In fact, in accordance with the practice codified in Fiscal Regulation No. 6 (Revised), January 1, 1944, all expenses are paid directly from funds of the United States placed in special deposit accounts provided

for in the forms found at pp. 386-394 of Document 4 (Plaintiff's Exhibit 7). As compensation, Article 5 of the general agency agreement allows "such fair and reasonable amount" as the Administrator shall from time to time determine. At the time Caldarola was injured compensation was fixed by War Shipping Administration General Order No. 34, December 31, 1943 (9 Fed. Reg. 1059). The basic amount totaled $80 per day per vessel for husbanding and accounting services. General agents and berth agents performing berth or port services are also compensated by certain amounts measured by the cargo and passengers loaded or unloaded. All compensation is subject to recapture or renegotiation to the extent found to be excessive. Under both the Roosevelt agreement and the general agency agreement the losses and profits of the operators fall upon the United States. The general agency agreement, however, differs in that the agent is no longer, as in the old forms, an independent contractor, "managing agent" or "managing operator". The general agent is restricted to being a ship's husband acting merely as an agent and under detailed government control.

Operation Under the 1942 Agreements.

It is obvious from the foregoing analysis that general agents and berth agents in the operation of War Shipping Administration vessels are mere agents limited to the performance of shore side or non-navigating functions under general supervision and are not allowed the broad discretion exercised by independent contractors in control or possession of the vessels. The general agency and berth agency agreements alike made every action of agents subject to "such directions, orders or regulations" as the Government should prescribe. And in fact the various activities of the agents were subjected to control through the medium of general orders, operations regulations, traffic regulations, fiscal regulations, legal bulletins, auditing and accounting instructions, insurance instructions and

medical directives and through supervision by the War Shipping Administration with the aid of some 5,000 employees located in the principal ports, as well as at Washington. The discretion of agents is particularly circumscribed by three practices followed by the War Shipping Administration in operating the Government's merchant fleet: (1) the appointment of both general agents to render husbanding services and berth agents to render port services to the vessels, (2) the Government's execution of master contracts for the principal services and supplies needed for the vessels, and (3) the requirement of Article 3A(d) that the master be an agent of the United States and not of the general agent and the crew subject only to the orders of the master. Such practices are, of course, entirely foreign to operation by independent contractors, as well as to private peacetime operation, for in those the independent contractor or private operator enjoys unlimited discretion in the sources and methods of services and supply.

The restrictions resulting from the combined use of berth agents and general agents are many and War Shipping Administration operations bear little resemblance to peacetime operations. Succinctly stated, just as general agents are charged with the function of arranging for maintaining and supplying the vessels for the account of the United States, so berth agents are charged with the correlative function of arranging for the account of the United States the port services required at each end of the route. The general agent "husbands" the vessel, consisting principally of victualing, supplying, maintaining and repairing, while the berth agent performs "port services," consisting principally of arranging for the handling and loading of cargo. At foreign ports, moreover, the berth agent, in addition to the cargo services, arranges for all husbanding services required.

Berth agents were generally chosen for routes over which they had previously operated vessels during peacetime and had developed organizations familiar with the local problems peculiar to such routes and the conditions

of loading and discharge at their ports. They were appointed on the basis of their special competence for handling special routes. General agents were appointed on the basis of their experience in husbanding vessels. Many companies acted both as general agents and as berth agents but their functions only coincided where vessels assigned to them as general agents were operated over routes assigned to them as berth agents. The delineation of the duties of general agents and berth agents is fully set forth in War Shipping Administration Operations Regulation No. 84, but may be conveniently illustrated by an example. Thus assume that the A Steamship Company was designated general agent of the United States to husband a vessel, *S/S Eks*. At the same time it was designated as berth agent of the United States for the New York to United Kingdom route over which it had been a peacetime operator. Thereafter the A Company would act as berth agent for any vessels, no matter what general agent might husband them, which operated on its route,—both while the vessels were at New York and when they arrived in the United Kingdom. And it would do so again on their return to New York if the representative of the War Shipping Administration in the United Kingdom who had charge of re-routing directed the vessels to return to New York. When the *Eks* operated on that route, A Company, as general agent, would therefore render berth agency services to it without special designation as berth agent. Now assume the B Steamship Company was designated as berth agent for a route from the Gulf of Mexico to the United Kingdom. When the *Eks* was assigned to make a voyage to the United Kingdom from a port in the Gulf of Mexico, the B Company, the regular berth agent for that route, and not the A Company, the ship's husband, would act as berth agent for the vessel both in the Gulf of Mexico and on its arrival in the United Kingdom. And this even though the A Company, the general agent for the *Eks*, was acting as berth agent in the same port in the United Kingdom for vessels on its New York-United Kingdom route. In other words, although a

general agent is acting as berth agent in the United Kingdom for vessels from United States North Atlantic ports, it will not act as berth agent for vessels arriving from a United States Gulf port even though the vessels should be among those assigned to it as general agent. Conversely, the B Company, acting as berth agent for the Gulf of Mexico-United Kingdom route, and not the A Company, the general agent, would perform the duties of husbanding the *Eks* in the United Kingdom.

The powers of general agents and berth agents were alike restricted when vessels entered the immediate war zone areas. In those cases the Government performed all such services either by the military authorities or by the War Shipping Administration's own foreign service representatives. (Organized under War Shipping Administration Administrative Order 2, Supplement 4, September 26, 1942, and 4A (Revised), see also Administrative Order 52, December 3, 1943.) At the height of operations, War Shipping Administration maintained a staff of 675 employees located in almost every foreign port in the world in which its vessels were operating. Operating regions, headed by a Regional Director reporting directly to the War Shipping Administrator, were set up to cover all foreign areas. Port representatives, port engineers, and, in some cases, supplemental administrative and legal personnel were assigned at important ports in such areas to carry out the functions of the War Shipping Administration. Foreign service personnel was transferred from port to port as the war theatres changed and new fronts became active. Even at present, in Japan and Korea, no American steamship companies have been permitted to operate. The business of government merchant vessels operating in those areas is still handled exclusively by the foreign service representatives of the Maritime Commission as successor to the War Shipping Administration, operating through the military authorities.

General agents were further restricted in the extent of their authority by the action of the Government in entering into master contracts for the procurement of various ser-

vices and supplies required by general agents and berth agents for husbanding the vessels and affording them port services. Thus master contracts for repairing, terminal operation, stevedoring, bunkering, and food stockpiling were entered into by the Government. (See pp. 408-583 of Document 4, Plaintiff's Exhibit 7.) All repairs to vessels under general agency agreements were performed under one of several types of repair contracts (pp. 408-496), which included both master contracts for principal repairs and special contract forms to be used by agents in contracting in the name of the United States for isolated repairs when repair contractors under master contracts were not available. Eventually, all oil bunkers and diesel fuels supplied were delivered to the master of the vessel pursuant to orders placed by the general agent on his requisition under contracts designated Warshipfuel and Warshipdiesel (pp. 550-554). A contract designated Warshipfood (pp. 556-564) was also prepared and executed in various ports to assure adequate supplies of scarce foods for vessels. Similar arrangements were made in respect of towage services in various ports (Operations Regulation 27 and supplements).

Even in the absence of master contracts, the War Shipping Administration instructed agents in many respects as to the terms of the contracts they were authorized to make. In accordance with the agency agreements, the provisions of Legal Bulletin No. 1 (September 22, 1942) and General Order No. 42 (9 Fed. Reg. 4110), such contracts for vessel supplies and services were required to be executed in the name of the United States and agents were referred to in that capacity only. It is believed attention should be drawn to the provisions of certain Operations Regulation and their supplements, particularly Nos. 27 (Towage Contracts), 84 (Duties of Berth Agents, General Agents and Agents), 97 (Bunker Oil Contracts), 99, Supplements 1 and 2 (Pilferage). While some of these regulations were issued subsequent to the date of Caldarola's injury, the procedures codified therein had been established at an earlier date. The close character of the control exercised over general agents and berth agents is further indicated by the duties assigned

to the various units of the War Shipping Administration Division of Operations as indicated in Administrative Order No. 50 together with Supplements 1, 8, 13 and 17 thereto.

The most significant restriction on general agents is the lack of control over the masters and crews serving on vessels assigned to them which results from the requirement of Article 3A(d) that the master shall be the agent of the United States, not of the general agent, and in the exercise of his duties in the navigation and management, has exclusive control over the vessel and its crew. General agents are thus confined to procuring the crews and serving as the channel of command between the War Shipping Administration and the master. In 1942, at the commencement of War Shipping Administration operations, collective bargaining agreements between the maritime unions and the steamship companies were continued in force in accordance with the so-called Statements of Policy of May 4 and May 12, 1942, signed jointly by representatives of the Administration and the unions (see War Shipping Administration Operations Regulation No. 1). Subsequent changes in wages and working conditions were approved by the War Shipping Administration, and where required, by the War Labor Board, before being placed in effect by the Administration. Moreover, a Division of Maritime Labor Relations was created by Administrative Order 20 of June 10, 1942, for the purpose of handling labor relation problems arising in the course of operations and insuring the continuance of proper labor relations.

The relationship between the seamen and the vessel is brought home to them in such a way that they can never have any reasonable doubt that they were serving on United States-owned and operated vessels. The articles of employment signed by the seaman designate the United States as the owner of the vessel and the general agent as its agent. Thereafter he is directly supervised and controlled by the master throughout the entire course of the voyage. A certificate of ownership as well as a copy of the articles is conspicuously posted on board and seamen are thus constantly aware that they are serving on a vessel owned and operated

by the United States. Upon termination of the voyage wages are paid to members of the crew by the master in the presence of a Shipping Commissioner. Funds for the purpose are made available to the general agent by the Administration through deposit in the special joint bank accounts set up in the name of the agent "as general agent for the War Shipping Administration." These procedures inevitably brought home to the seaman his status was that of an employee of the United States.

It is believed that the above explanation of the roles of berth agents and master contracts and the status of masters and crews as employees of the United States shows that in their operations general agents clearly were not authorized to exercise the rights of an owner *pro hac vice* in manning, navigating and managing the vessels assigned to them. For your further assistance there is submitted with this letter a collection of official documents referred to herein so far as they are not included in Document 4 (Plaintiff's Exhibit 7).

Conclusion.

It is believed that the foregoing explanation conclusively establishes the purpose of the War Shipping Administration in undertaking direct operaton of its vessels by masters and crews subject exclusively to its control. The purpose appears to have been three-fold: First, to retain for government shipping the right to invoke sovereign immunity from foreign and local inspection, regulation and taxation; Second, to obtain for government shipping the freedom from strikes or labor stoppages which results from preserving the status of all seamen on War Shipping Administration vessels as government employees; Third, to insure the preservation of indispensable wartime secrecy by confining all litigation which might in any way involve the navigation and physical management of government vessels to the admiralty courts where necessary security measures could be applied. It is believed that the explanation further shows beyond the possibility of doubt that operation under the

general agency and berth agency agreements, as carried out by the regulations and master contracts of the War Shipping Administration, was direct government operation, differing in every essential respect from the peacetime contract operations involved in cases such as *Quinn* v. *Southgate-Nelson Co.* and *Brady* v. *Roosevelt S. S. Co.*

Respectfully,

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